IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34114

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 390**
	)	
Plaintiff-Respondent,	)	**Filed: March 20, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JAMES ALLEN FLOYD,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Elmore County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for possession of methamphetamine, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

James Allen Floyd appeals from the judgment of conviction for possession of methamphetamine, Idaho Code Section 37-2732(c)(1), entered upon his conditional plea of guilty. He asserts that the district court erred in denying his motion to suppress evidence. We affirm.

I.
BACKGROUND AND PROCEDURE

A quantity of methamphetamine was found in Floyd's sock when he was searched at the Elmore County Sheriff's Office after Floyd had been arrested for possession of marijuana. Floyd sought to have the methamphetamine suppressed based on his argument that the officers who stopped Floyd did not have a reasonable suspicion that Floyd was engaged in any criminal activity or that Floyd was armed or dangerous when they searched him, thereby rendering the subsequent search and discovery of the methamphetamine at the sheriff's office illegal under the

Wong Sun doctrine.[1] The district court denied Floyd's motion to suppress the evidence. Floyd thereafter entered a conditional plea of guilty to the methamphetamine charge, preserving his right to challenge on appeal the denial of his motion to suppress. He subsequently brought this appeal.

II.
STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. On review of a motion to suppress evidence, the appellate court defers to the trial court's factual findings that are supported by substantial evidence, but conducts free review of the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

III.
DISCUSSION

The facts relating to Floyd's searches and arrests were submitted to the district court by way of the transcript of a Grand Jury proceeding that had indicted Floyd on the methamphetamine charge. From that transcript, the district court made the following findings:

> Officer Russell Griggs, of the Mountain Home Police Department testified before the grand jury. Officer Griggs testified that [he] was on duty on November 21, 2003, when he responded to a call for an officer needing assistance. Another officer had requested assistance in searching for a male suspect wearing dark clothing and of medium build.
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> Officer Griggs observed a male wearing dark clothing walking in the area. When the male saw Officer Griggs, in his patrol car, he "took off running." After Officer Griggs caught up with him he "took over commands due to the fact that he was not showing both of his hands. It was unknown at this time if he had a weapon. He is being verbally challenged to pull his hands out of his pocket. I did approach him with my canine at that time. Once he was placed on the ground, he was still refusing to show his right hand, and it appeared at that time that his right hand and arm were moving underneath him. I don't know what he was messing with at that time."
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> "Officer Broughton did, I believe, a cursory pat-down search for weapons. And, at that time requested for me to do a second one.[2] At which time, I did. I didn't feel any bulky items or hard items that may have been a weapon at that time." However, "during the time I was doing a pat-down search on this male, I went down his right leg, and, as I bent over, I noticed a white cellophane wrapper

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1 *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

2 The district court noted that Officer Broughton is a female officer.

that comes off of cigarette cartons. At that time, the [defendant] tried to move his foot over and step on top of it like he was trying to hide it. At that time, I touched his right foot to move it out of the way. I did challenge him on the question of why he was trying to cover that up. At that time, I picked it up. And I've seen [through] my drug classes and stuff that in packaging material, this is a common item used. They just pull off the cigarette carton and package a controlled substance in it[."] Officer Griggs testified that the package smelled of marijuana and "where the wrapper was, there was shredded up green plant material on the asphalt."

Officer Griggs testified that Officer Broughton advised the defendant that he was under arrest for possession of a controlled substance, for what the officers believed was marijuana at the time.

Officer Broughton testified that after the police caught up with the defendant, "[h]e had his right hand in his waistband of his pocket, right in the front area and then he went down on the ground, and we ordered him several times to remove his right hand. He didn't comply at first, but then he eventually did. . . . When he had gotten up, I did the pat down to make sure he didn't have any type of weapons on him. He was trying to step on a . . . small plastic baggie which smelled of -- an odor of marijuana. . . . And there was some green, leafy substance on the ground."

Officer Broughton testified that, after his arrest, the defendant was placed in the back of the patrol car. After they got to the Sheriff's Office, Officer Broughton said she had a "jail deputy come out because I didn't know what he was doing in the back of the car, and we got him out of the car and there was a small plastic baggie of marijuana on the floorboard of the car. It was not there before we put him in. I specifically know this because I had my flashlight when he placed him in the back of my car. . . . There was a green leafy substance inside the baggie which smelled -- which I'm familiar with as an odor of marijuana, which was later tested."

During the jail pat down of the defendant, "after we removed his socks, there was a substance that I recognized through previous dealings with to be a controlled substance within the sock. . . . It appeared to be methamphetamine."

After reciting the foregoing factual determinations, the district court set forth its legal conclusions. The court stated:

In the court's view, the defendant's motion to suppress is without merit. The police acted reasonably in apprehending the defendant. He matched the description of the suspect and he fled when he saw the police. Furthermore, they acted reasonably in patting him down for weapons since he had resisted and refused to comply with their directions to reveal both of his hands. Officer Broughton indicated that the plastic baggie surrounded by the green leafy material may have been observed on the ground during the initial pat-down of the male defendant for weapons. However, it would not have been unreasonable for Officer Broughton, a female, to request Officer Griggs, a male, to conduct a more thorough pat-down of the defendant for weapons. Moreover, the plastic baggie

was not discovered on the defendant's person during the search, but was observed, in plain view, on the ground.[3]

A. Initial Detention of Floyd

Floyd argues that the officer's initial detention of him was not supported by reasonable articulable suspicion of criminal activity as required for an investigatory stop by *Terry v. Ohio,* 392 U.S. 1, 30 (1968). Although the district court's determination in this regard was cursory ("he matched the description of the suspect and he fled when he saw the police"), the transcript of the Grand Jury proceeding contains substantial evidence to support the district court's statement. Therein we find greater elaboration upon the initial contact between the police officers and Floyd.

Officer Mogolich testified that at about midnight on November 21, 2003, he saw two males riding together on a bicycle without a light on the bike, in violation of state and city laws.[4] After the officer began to follow the bicycle with his patrol vehicle's overhead lights on, the driver of the bike turned around, looked at the officer, and took off on the bike, with both men still riding on it. A short time later, as they were still being pursued by the officer, both men jumped off the bike and ran when they were between a house and a Shell gas station. After

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[3] In a footnote to its decision, the district court supported its conclusion that the motion to suppress would be denied, with the following:

> A stop is justified "if there is a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." *State v. Cox*, 136 Idaho 858, [862,] 41 P.3d 744, 748 (Ct. App. 2002). "An officer may frisk an individual if the officer can point to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing with may be armed and presently dangerous and nothing in the initial stages of the encounter serves to dispel this belief." *Id*. There is no reasonable expectation of privacy in objects observed in public in plain view. *See, e.g., State v. Coma*, 133 Idaho 29, [33,] 981 P.2d 754, 758 (Ct. App. 1999) ("[W]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."). *See also State v. White*, 2002 WL 63294, *4 (Ohio Ct. App.) (no Fourth Amendment violation where police briefly detain a suspect so that a police officer of the same gender can arrive to conduct a more thorough pat-down of the suspect, who has already been patted down in a cursory fashion by an officer of the opposite sex).

[4] See I.C. § 49-715(2) ("no bicycle . . . shall be used to carry more persons at one (1) time than the number for which it is designed and equipped."); I.C. § 49-723 (light and reflector required at night).

catching the passenger, Officer Mogolich notified other police units that he was in pursuit of the other male, which he described as having a medium build and wearing a dark-colored military jacket and dark-colored pants.

Shortly after Officer Mogolich's dispatch, Officer Broughton was standing in the alley behind the Shell station when she saw a man, later determined to be Floyd, run across the street, through an alley, behind the Idaho Youth Ranch store and around the corner. Officer Broughton gave chase on foot, thinking that the man was the driver of the bicycle who had fled from Officer Mogolich. When she saw Floyd, Officer Broughton was only about fifty feet from where she had been when she received the initial call. According to Officer Griggs, after he heard Officer Mogolich's report that a male wearing dark clothing and "probably medium build" had gotten away from him, he began to search the two or three block area of Mountain Home, when he noticed Floyd, wearing dark clothing, walking up against a building. Before Officer Griggs could use his PA system to tell Floyd to stop, Floyd went around a corner and when he saw the officer, he "took off running." Officer Griggs explained that the area where he observed Floyd had been the site of a number of downtown business burglaries in the last few days, and when Floyd saw the officer in his patrol car with the emergency lights on and took off running this gave the officer a "reason for the contact."

Floyd's flight from Officer Griggs is significant. In *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000), The United States Supreme Court held that evasive behavior can be a basis for reasonable suspicion. In *Wardlow*, the defendant fled upon seeing the police officers patrolling an area known for heavy narcotics trafficking. When Wardlow was stopped and frisked, the officers found a gun. In holding that the officers had reasonable suspicion, the Court stated that nervous, evasive behavior is a pertinent factor to be considered in the totality of the circumstances analysis, and that headlong flight is the consummate act of evasion. *Id*. at 124.

The "reasonable suspicion" standard is that the officer can articulate specific facts which, along with the reasonable inferences from those facts, justify the suspicion that the person is or has been involved in criminal activity. *State v. Gallegos*, 120 Idaho 894, 896, 821 P.2d 949, 951 (1991). This standard is less than the probable cause standard. *Id*. at 896, 821 P.2d at 951. Whether the police officer had the requisite reasonable suspicion to conduct the stop is determined on the basis of the totality of the circumstances. *State v. Rawlings*, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992), *citing United States v. Cortez*, 449 U.S. 411 (1981). Based on

the totality of the information known by the officers at the time, they had reasonable suspicion that Floyd was the driver of the bicycle who had run away from Officer Mogolich--even though it was later determined otherwise. *See Brinegar v. United States*, 338 U.S. 160, 164 (1949*); State v. McCarthy*, 133 Idaho 119, 124, 982 P.2d 954, 959 (Ct. App. 1999). Floyd matched the general description of the driver of the bicycle, was seen very shortly in the same locale as where the driver had fled, and started running when he was noticed in a recent high crime area by Officer Griggs.

In sum, the totality of the circumstances at the time the police officers detained Floyd supported the officers' reasonable suspicion, based upon articulable facts, that Floyd may have been involved in criminal activity either as the driver of the bicycle who fled from Officer Mogolich, or as a burglar operating late at night in the downtown area of Mountain Home. We conclude that the district court did not err in holding that the police officers acted reasonably in detaining Floyd.

B. Pat-down Searches

Floyd does not challenge the legality of the initial pat-down search conducted by Officer Broughton except as he argued that it may not have been justified with a reasonable suspicion supporting the *Terry* detention, a justification which we have found to be proper. Indeed, Floyd's refusal to comply with the officers' directives to remove his hands from his waistband gave them reason to believe he might be armed and dangerous as they pursued their investigation with him. Rather, Floyd contends that the follow-up pat-down search done by Officer Griggs at the request of the female officer, Broughton, was unreasonable because the initial frisk by Officer Broughton should have dispelled any suspicion that Floyd was carrying any weapons. It was, of course, during the search by Officer Griggs that the officers found what they believed to be marijuana in proximity to Floyd's right foot. Floyd argues that Officer Griggs only noticed the cellophane wrapper and the plant material once he commenced the second frisk. Floyd postulates that had Officer Griggs not been engaging in the frisk, he would not have had occasion to view this material and then place Floyd under arrest for possession of marijuana.

The search by Officer Griggs was a nearly concurrent extension of the cursory frisk by Officer Broughton, obviously conducted to complete the frisk by an officer of the same gender as Floyd. The courts in at least two other jurisdictions have concluded that extending a frisk for weapons for a few minutes to allow for a more thorough pat-down of the front of the lower waist

area of the detainee, by an officer of the same gender as the detainee, is reasonable. *See State v. Adams*, 836 So. 2d 9, 14 (La. 2003); and the case cited by the district court in our footnote 3, *supra*, *State v. White*, 2002 WL 63294,*4 (Ohio App. 2d Dist.). Similarly, in this case, it was reasonable for Officer Broughton to be sensitive to the gender difference between her and Floyd, and to ask Officer Griggs who was present at the scene to immediately conduct a more thorough pat-down search of Floyd's groin area. In addition, as the state points out, the contraband was not found as part of the frisk of Floyd's person. Rather it was in plain view on the ground. Floyd's argument that it would not have been seen but for the second frisk is pure speculation.

We conclude that the district did not err in holding that the detention and frisk of Floyd did not violate Floyd's Fourth Amendment rights.

IV.

CONCLUSION

The district court did not err in denying Floyd's motion to suppress evidence. The judgment of conviction for possession of methamphetamine is affirmed.

Judge PERRY and Judge GRATTON **CONCUR**.